

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Definition of Markets for Purposes of the
Cable Television Mandatory Television
Broadcast Signal Carriage Rules

CS Docket No. 95-178

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REPLY COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

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The following reply comments are submitted by the Association of Local Television Stations, Inc. ("ALTV"), in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding.¹ ALTV supports use of Nielsen DMAs in place of the now defunct Arbitron ADIs and continuation of the triennial revisions adopted by the Commission in 1993.² Cable interests on the other hand favor elimination of triennial revisions and perpetual reliance on the 1991-92 Arbitron ADI list -- also the Commission's favored proposal.³

¹FCC 95-143 (released April 7, 1995)[hereinafter cited as *Notice*].

²*Report and Order*, 8 FCC Rcd 2965, 2975 (1993) [hereinafter cited as *Report and Order*].

³*Notice* at ¶ 7.

ALTV respectfully submits that the arguments advanced in favor of the Commission's proposal are far from compelling and lend no material support to those offered initially by the Commission.

First, cable interests argue that a shift to DMAs would engender subscriber confusion.⁴ Their own comments, however, establish that the potential for confusion would be minimal. As CATA so accurately observes, "If the Commission were to switch to DMAs, all over the country there would be *slight* dislocations in channel line-ups, and channel numbering."⁵ Indeed, the number of counties affected on a nationwide basis in a shift to DMAs would barely exceed the number of counties which likely would have been affected by the anticipated triennial revision this year had Arbitron continued to publish annual ADI lists.⁶ Even with respect to triennial revisions of the market list, cable interests themselves call the number of changes in market designations over time "slight."⁷ Thus, no widespread subscriber revolt is likely.

The concern about subscriber confusion also rings hollow because it is self-serving to the point of hypocrisy. What cable interests conveniently neglect is that most of the disruption and confusion which has occurred as a result of implementation of the Cable Act has been as a result of regulations designed to protect cable subscribers from an industry that has taken them for granted

⁴Comments of the Cable Telecommunications Association, CS Docket No. 95-178, filed February 5, 1996, at 3 [hereinafter cited as CATA]; Comments of the Small Business Cable Association, CS Docket No. 95-178, filed January 19, 1996, at 6 [hereinafter cited as SBCA].

⁵CATA at 3 [emphasis supplied].

⁶See Comments of the Christian Network, Inc., CS Docket No. 95-178, filed February 5, 1996, at 6, n.10 [hereinafter cited as "CNI"].

⁷Comments of Cox Communications, Inc., CS Docket No. 95-178, filed January 19, 1996, at 3 [hereinafter cited as Cox]; Comments of Cole, Raywid, and Braverman, CS Docket No. 95-178, filed February 5, 1996, at 3, n.1 [hereinafter cited as CRB] ("Historically, neither Arbitron nor Nielsen have made dramatic changes to their market assignments from one reporting period to the next.").



in the notorious fashion of the ever arrogant monopolist. Congress did not enact the Cable Act (via override of a presidential veto) as a form of self-amusement. It acted in response to a virtual subscriber revolt against sky-high cable rates, mediocre service, and lack of response to their complaints. In the same vein, cable operators also claim that they "traditionally have minimized programming changes."⁸ This from the industry that shuffled broadcast signals around their systems at will prior to the restoration of must carry and channel positioning requirements in the Cable Act, but with no apparent concern that subscribers might be confused. Finally, cable operators, who so often have groused about being required to carry allegedly less popular broadcast stations in lieu of cable channels their subscribers allegedly are all, but dying to see, utterly ignore that market designation changes will assure carriage of a more heavily viewed array of local stations. Like the ADI, the DMA is comprised of counties in which stations from the same market share a preponderance of viewing.⁹ Therefore, cable operators' sudden self-righteous trumpeting of their subscribers' plight strains credulity well beyond the breaking point.

Also left out of cable operators' equation are the interests of nonsubscribers -- interests which were central to Congress's rationale for requiring carriage of local television stations in the first place. These interests hardly may be considered inconsequential. As the Supreme Court stated

⁸CRB at 3.

⁹The suggestion that cable systems actually might have to drop services to accommodate stations from a newly designated market has no more credibility than the cable industry's continuing, but specious complaint about the alleged burden of the must carry requirement in the first place. As NAB and ALTV recently pointed out:

Although appellants point to approximately 5,000 instances of must-carry stations added -- and thus hypothesize a potential maximum of 5,000 instances of cable programmers who *may* have been denied carriage because of must-carry -- their own expert claimed only 530 instances where cable programming services were dropped, for any reason. In any event, even 5,000 instances would be an insubstantial fraction of cable's half-million aggregate channel capacity.

NAB/INTV Motion to Affirm, *Turner Broadcasting System, Inc., v. FCC*, No. 95-992 (U.S. Sup. Ct, filed January 20, 1996) at 16.

in *Turner Broadcasting System, Inc., v. FCC*, 114 S.Ct. 2445, 2461 (1994), “Congress’ overriding objective in enacting must-carry” was “to preserve access to free television programming for 40 percent of American households without cable.” The efficacy of must-carry rests on the definition of the area in which a station is considered local and, therefore, entitled to insist on cable carriage of its signal. In relying on the industry’s definition of local (then the ADI), Congress sought “to assure that television stations be carried in the areas which they serve and which form their economic market.”¹⁰ Elevating a supposed concern over subscriber convenience over the fundamental goal and essential functioning of the must carry requirement would render the must carry requirement less effectual in direct contravention of the statute.¹¹

Second, cable operators complain that changes in market designations might impose some costs on their systems.¹² Nowhere, however, are these costs quantified. Also lacking (necessarily) is any projection of impact on the operations or viability of affected cable systems. This failure to even begin to quantify supposed costs or describe their impact on cable system operations is a glaring shortcoming in cable operators’ arguments. The Commission has proposed a complete reversal in its approach. More than generalities and speculation are required to justify such a change.

¹⁰*Id.* at 97.

¹¹To suggest, as one party has, that Congress opened the door to this untenable result in Section 301(d)(1) of the Telecommunications Act of 1996 (“’96 Act”) is fanciful. CRB at 2-3. As amended by the ‘96 Act, Section 614(h)(1)(C) of the Communications Act of 1934, 47 U.S.C. §534(h)(1)(C), provides that “a broadcasting stations’ market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns.” This is mandatory language, and Nielsen now provides the *only* “commercial publication which delineate[s] television markets based on viewing patterns.” CRB, nonetheless, suggests that Congress could have specified Nielsen’s DMA list, and in the absence of such a provision has left the Commission discretion to continue to use the Arbitron DMAs. This contention has no merit. Arbitron ADIs are now relics, not commercial publications.

¹²*E.g.*, SCBA at 1-5.

Third, cable interests knit their brows and wring their hands about the effect of shifting to DMAs on retransmission consent agreements.¹³ They claim, for example, that multi-year deals will be impossible. They worry about existing multi-year deals. To borrow from *the* bard, ALTV suggests that these concerns are “much ado about nothing.” Lawyers for cable operators and broadcasters are perfectly capable of writing contracts with provisions to cover contingencies such as a change in market designation. Future multi-year agreements, therefore, should remain undeterred. Existing multi-year agreements also are likely to include such provisions (or should have) because a triennial review has been scheduled for 1996 since 1993 when the Commission adopted the current approach. In a rare case where an existing agreement might be caught mid-stream in a market change (and lacking a provision for such contingency), ALTV reminds the Commission that private contracts have been subject to federal law for years and to changes in those laws. Any provision contrary to the law would be superseded.¹⁴

Fourth, cable operators grumble that changes in market definition would affect their liability under the cable compulsory license.¹⁵ This is true, but nothing to complain about. Local signals under must carry will remain free. Distant signals will require payment of royalties. This is as it ought to be. Furthermore, the market modification process, otherwise much touted by cable operators, remains available to prevent arbitrary outcomes.¹⁶

¹³*E.g.*, SCBA at 5; Cox at 4; CRB at 4.

¹⁴*See, e.g., Report and Order* at 2988 (“With respect to conflicts between the carriage or channel positioning rights of a must-carry station and prior agreements between cable operators and cable program services, we find that such provisions of the 1992 Cable Act supersede any such contracts.”).

¹⁵*E.g.*, Cox at 6.

¹⁶The same may be said in response to Cox’s concern about the Phoenix-Flagstaff market. Cox at 5. This lone example appears more the exception that proves the rule.

Fifth, some cable operators decry a “windfall for certain broadcasters” as a result of market changes.¹⁷ Such arguments only underscore that the bulk of the effect of market changes will be felt by broadcasters. Some markets will lose counties; others will gain counties. Stations in those markets will be affected. Some will gain carriage rights in new counties. Others will lose carriage rights in counties where they have been carried. Broadcasters (with rare exception) are prepared to accept that risk and burden because in the final analysis, cable carriage which reflects the *realities* of viewing and advertising markets best preserves and promotes the interests of viewers (including cable subscribers), stations, and even cable systems. Thus, to characterize carriage of a station’s signal in the market in which it seeks to provide programming and advertising (by virtue of its inclusion in the DMA) as a windfall is ludicrous.

Lastly, CATA calls for “regulatory stability.”¹⁸ This is precisely what ALTV seeks -- no change in the Commission’s basic approach to market designations. ALTV urges maintaining the current system of triennial revisions. What CATA seeks is not regulatory stability, but temporal rigidity. It wants time to stop. Using the 1991-92 Arbitron ADIs in perpetuity, however, makes no more sense than using a 1990 map of Europe.

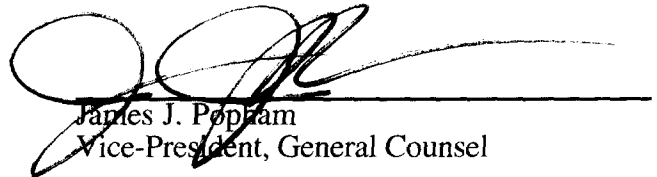
¹⁷CRB at 3.

¹⁸CATA at 2.

[REDACTED]

In view of the above, ALTV reiterates that no real basis has been suggested to dismantle a perfectly sound approach to market definitions. Indeed, the arguments offered by cable operators' fall far short of justifying a seminal change in a regulatory program adopted only three years ago. Therefore, ALTV urges the Commission to replace ADIs with DMAs and maintain the current scheme of triennial revisions.

Respectfully submitted,


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